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CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1934.

No. 661

LEO AWOTIN,

Petitioner,

vs.

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, AND BRIEF IN SUPPORT THEREOF.

SAMUEL A. ETTELSON,
EDWARD C. HIGGINS,
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ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

Now comes Leo Awotin and respectfully petitions this Honorable Court to grant a writ of *certiorari* to the Appellate Court of Illinois, First District, and to remove therefrom to this Court for review the record in the case lately pending in the said Appellate Court entitled, *Leo Awotin* v. *Atlas Exchange National Bank of Chicago, a corporation,* being case No. 37307, on the docket of the said Appellate Court of Illinois. The Supreme Court of Illinois denied your petitioner's Petition for Leave to Appeal on October 23, 1934. (Rec. p. 53)

A duly certified record is filed herewith under separate cover and includes all of the proceedings in the Circuit Court of Cook County where said cause was tried, in the Appellate Court of Illinois, First District, in which Court the respondent herein, the said Atlas Exchange National Bank of Chicago, prosecuted a writ of error to review the judgment of the trial court, and in the Supreme Court of Illinois, in which your petitioner filed his said Petition for Leave to Appeal from the judgment of said Appellate Court of Illinois.

I.

Statement of facts and proceedings.

Your petitioner respectfully represents unto this Honorable Court that this cause was before the Appellate Court of Illinois, First District, on the pleadings. In the interest of brevity your petitioner will summarize the proceedings and the pertinent facts will appear therefrom.

Your petitioner respectfully represents unto this Honorable Court that in the trial court he was the plaintiff and the respondent was the defendant.

The action is in assumpsit and the declaration contains a count in special assumpsit upon a written contract. The following is alleged in substance: The payment by your petitioner of Thirty Five Thousand Dollars ($35,000) in consideration of the delivery by the respondent to your petitioner of thirty-five (35) One Thousand Dollar ($1,000) par value First National Company real estate bonds and a written agreement by the respondent to repurchase the same at maturity, paying therefor the par value of said bonds and accrued interest thereon, and further alleging the breach of said contract. (Rec. p. 1)

The declaration also contained the common counts in general assumpsit. (Rec. p. 1)

Your petitioner filed with his said declaration an affidavit of claim, pursuant to the Illinois Practice Act of 1907 (Cahill's Illinois Revised Statutes, 1931, Chapter 110, paragraph 55). The affidavit stated, in substance, that the nature of your petitioner's demand was upon said written contract to repurchase from your petitioner said bonds, as aforesaid. (Rec. p. 4)

To said declaration the respondent filed two pleas: (1) The general issue, and (2) a special plea alleging that said written contract was *ultra vires* the respondent under the National Bank Act. (Rec. p. 6)

With each of said pleas, the respondent filed the requisite affidavits of defense, the one filed to the special plea alleging, in substance, that the respondent was a National Bank organized under the National Banking laws and that it had no authority, under said banking laws, to make this agreement. (Rec. p. 6)

The Circuit Court of Cook County, after a trial, entered a judgment in favor of said respondent, from which judgment your petitioner appealed to the Appellate Court of Illinois, First District. Said Appellate Court reversed said judgment and remanded said cause to the trial court. (Rec. p. 7) The decision of the Appellate Court of Illinois on said appeal is reported in 265 Ill. App. 238.

After said cause was redocketed in the Circuit Court of Cook County, that Court, on April 15, 1932, struck the respondent's affidavit of meritorious defense filed with its special plea, on the ground of its insufficiency in law, and entered a judgment, as upon default, in favor of your petitioner and against the respondent for the sum of Thirty

Nine Thousand Eight Hundred Forty One Dollars and Sixty Six Cents ($39,841.66), together with your petitioner's costs of suit. (Rec. p. 7) (Cahill's Illinois Revised Statutes, 1931, Chap. 110, par. 55)

On December 28, 1933, the respondent sued out a writ of error in the Appellate Court of Illinois, First District, to review the said judgment of the Circuit Court of Cook County, and, thereafter, on, to wit, June 15, 1934, the said Appellate Court of Illinois, First District, reversed the said judgment of said Circuit Court of Cook County and, without remanding said cause to the trial court, entered its own judgment against your petitioner. (Rec. p. 25)

On June 26, 1934, the said Appellate Court of Illinois denied the motion of your petitioner for a certificate of importance and an appeal to the Supreme Court of Illinois. (Rec. p. 26)

On October 23, 1934, the Supreme Court of Illinois denied to your petitioner leave to appeal to said Supreme Court of Illinois from the judgment of the Appellate Court of Illinois, First District, (Rec. p. 53) and by virtue of sub-section (2), Section 75, Article VIII of the Illinois Civil Practice Act (Cahill's Illinois Revised Statutes, 1933, chapter 110, paragraph 203), the said judgment of the Appellate Court of Illinois became final.

Since it is discretionary with the Supreme Court of Illinois to review the decision of the Appellate Court on Petition for Leave to Appeal, and since the Supreme Court of Illinois has denied your petitioner's said Petition for Leave to Appeal, a writ of *certiorari* from this Court should be addressed to the Appellate Court of Illinois, First District, commanding it to certify and to send to this Court the record of the proceedings in said cause. The limit of time for the making of such application in this Court runs from

the date when the Petition for Leave to Appeal was denied by the Supreme Court of Illinois, the highest tribunal in the State of Illinois in which a decision in this cause can be had, on October 23, 1934.

American Railway Express Co. v. *Levee*, 263 U. S. 19, 20.

II.

Reasons for the allowance of the writ.

Your petitioner further respectfully represents that he is aggrieved by the final judgment of the Appellate Court of Illinois and the final order of the Supreme Court of Illinois, wherein said Supreme Court of Illinois denied your petitioner's Petition for Leave to Appeal from said judgment of the Appellate Court of Illinois; that the matters at issue are wholly of a Federal nature and are of peculiar gravity and importance in that the said Appellate Court of Illinois has decided a Federal question of substance under the National Bank Act (44 Stat. 1226) not heretofore determined by this Honorable Court and, further, in that said Appellate Court of Illinois has decided a Federal question of substance under said National Bank Act in a way probably not in accord with the applicable decisions of this Honorable Court.

A.

Specifications of error.

The errors on account of which the judgment of the Appellate Court of Illinois, First District, should be reversed are as follows, to wit:

1. The Appellate Court of Illinois erred in finding and holding that the respondent had no power or authority

under the National Bank Act as then in force (44 Stat. 1226) to make and enter into the repurchase agreement sued upon and set forth in your petitioner's declaration, and in finding and holding that by reason thereof said contract was *ultra vires* and void, and that no recovery could be had thereon.

2. The Appellate Court of Illinois erred in not finding and holding that the respondent had the power and authority under the National Bank Act as then in force (44 Stat. 1226) to make and enter into the repurchase agreement sued upon and set forth in your petitioner's declaration, and in not finding and holding that said contract was within the corporate power of said respondent, and that your petitioner could recover thereon.

3. The Appellate Court of Illinois erred, after finding and holding that the repurchase contract and agreement was *ultra vires* and void under the National Bank Act, in finding and holding that your petitioner was not entitled to recover from the respondent on an implied assumpsit, the moneys paid by your petitioner to said respondent in reliance upon said void contract and agreement.

4. The Appellate Court of Illinois erred, after finding and holding that the repurchase contract and agreement was *ultra vires* and void under the National Bank Act, in not finding and holding that your petitioner was entitled to recover from the respondent herein on an implied assumpsit, the moneys paid by your petitioner to said respondent in reliance upon said void contract and agreement.

B.

Summary of points relied upon for reversal of judgment.

I. The agreement of the respondent to repurchase from the petitioner on demand at the maturity thereof at par or Thirty Five Thousand Dollars ($35,000), the Thirty Five Thousand Dollars ($35,000) First National Company Collateral Trust, Series "O," First Mortgage Real Estate 5½% Gold Bonds is within the corporate powers and authority of the respondent under its charter and the National Bank Act.

A. The National Bank Act, under which the respondent was organized, expressly authorized the respondent to buy and sell without recourse the bonds in question.

B. The sale of the bonds by the respondent to the petitioner, coupled with the repurchase agreement, was a sale without recourse within the meaning of the National Bank Act.

C. Even if the repurchase agreement is construed as a guaranty, it is an incidental power of the respondent as a National Bank to make a contract of guaranty for its own benefit.

II. The respondent, having received the benefits of the repurchase contract is estopped to plead its want of authority to enter into such an agreement.

III. Even if the repurchase agreement is ultra vires and void, the petitioner is entitled to recover from the respondent, in general assumpsit, the amount of money he paid to said respondent for the purchase of the bonds in question on the strength of said agreement.

III.

Jurisdiction of this Court.

Your petitioner respectfully represents to this Honorable Court that this case involves a Federal question, namely, the rights, privileges, immunities and the extent of liability, if any, of a national banking association organized and existing under the laws of the United States.

First National Bank, etc. v. *Alexander Anderson,* 172 U. S. 573.

Leander J. McCormick v. *Market National Bank of Chicago,* 165 U. S. 538.

Logan County National Bank v. *Townsend,* 139 U. S. 67, pp. 72, 73.

It follows from the fact that this case involves a Federal question and from the further fact that the decision of the Appellate Court of Illinois, First District, is from the highest court of the State of Illinois in which a decision in this case can be obtained, that it is within the jurisdiction of this Court to entertain this petition and to issue its writ of *certiorari* as herein prayed.

Chicago & Eastern Illinois R. R. Co. v. *Industrial Commission of Illinois,* 284 U. S. 296, 297.

Chesapeake & Ohio R. R. Co. v. *Mihas,* 280 U. S. 102, 104.

Minneapolis, St. P. & S. S. Ry. Co. v. *Rock,* 279 U. S. 410.

American Railway Express Co. v. *Levee,* 263 U. S. 19.

IV.

Prayer.

For the purpose of correcting the errors complained of and to the end that the rights of your petitioner may be determined in accordance with the Federal law, your petitioner respectfully prays that a writ of *certiorari* may be issued under the seal of this Court directed to the Appellate Court of Illinois, First District, commanding it to certify and send to this Court on a day certain to be therein designated a full and complete transcript of the record and proceedings of said Appellate Court in the within case, to the end that the judgment of said Appellate Court of Illinois, First District, may be reviewed by this Court, as provided by law and that the judgment of the Appellate Court of Illinois may be reversed by this Honorable Court and that your petitioner may have such other relief as to this Court may seem appropriate.

LEO AWOTIN,
Petitioner.

SAMUEL A. ETTELSON,

EDWARD C. HIGGINS,
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1934.

No.

LEO AWOTIN,

Petitioner,

vs.

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

I.

The agreement of the respondent to repurchase from the petitioner on demand at the maturity thereof at par or Thirty Five Thousand Dollars ($35,000), the Thirty Five Thousand Dollars ($35,000) First National Company Collateral Trust, Series "O," First Mortgage Real Estate 5½% Gold Bonds is within the corporate powers and authority of the respondent under its charter and the National Bank Act.

A.

The National Bank Act, under which the respondent was organized, expressly authorized the respondent to buy and sell without recourse the bonds in question.

The National Bank Act of 1922, as amended by the Act of February 25, 1927, c. 191, sec. 2; 44 Stat. 1226, which was in force at the time when the respondent sold the First National Company bonds to the petitioner, provided as follows:

> "• • • The association shall become • • • a body corporate, • • • and it shall have the power—
>
> "*Third.* To make contracts. • • •
>
> "*Seventh.* To exercise • • • all such incidental powers as shall be necessary to carry on the business of banking; • • • Provided, That the business of buying and selling investment securities shall hereafter be limited to buying and selling without recourse marketable obligations, evidencing indebtedness of any person, co-partnership, association or corporation, in the form of bonds, notes and/or debentures, commonly known as investment securities • • •."

Under the authority of this statute, the respondent Bank was empowered to buy and sell without recourse the bonds in question and enter into contracts. The respondent had statutory power for every element involved in the instant transaction.

B.

The sale of the bonds by the respondent to the petitioner, coupled with the repurchase agreement, was a sale without recourse within the meaning of the National Bank Act.

The term "without recourse" has a definite legal denotation, namely: without guaranteeing the performance of a third party's obligation; or without liability on the obligation of a third party upon his failure to perform.

With this definition before us, let us examine the written contract of November 1, 1929. For the convenience of the Court we will set forth the contract, which reads as follows:

"ATLAS EXCHANGE NATIONAL BANK
OF CHICAGO
Capital and Surplus $240,000
Chicago, Ill.

Nov. 1, 1929.

Mr. Leo Awotin,
1920 S. Halsted St.
Chicago, Illinois.

Dear Sir:

This is to acknowledge that we have this day sold you thirty-five thousand ($35,000) Dollars, par value First National Company, Collateral Trust, Series 'O' First Mortgage Real Estate 5½% Gold Bonds, in denominations of $1,000 each, numbered as follows: Nos. 4584-4585 and 4612 to 4644 inclusive.

Should you desire to re-sell these bonds to us, we hereby agree to re-purchase same at maturity at par or $35,000 and accrued interest.

Yours very truly,

B. M. Blankenheim,
Cashier."

There is not one word in the agreement which hints at a guaranty or which provides recourse against the respondent; the respondent does not, by this agreement, undertake to pay the bonds in the event that the First National Company fails to do so. The respondent's obligation to repurchase the bonds is in no wise conditioned upon the failure of the First National Company to pay them when they matured. It is clear from the language of this contract that the respondent's obligation thereunder is to repurchase these bonds upon the demand of your petitioner, independently of the performance or non-performance by the maker of its obligation to pay them at their maturity. The essential element of a guaranty is, therefore, lacking, and there is no justification for reading that element into the contract.

Viewed from another aspect, we respectfully submit to the Court that the respondent's agreement cannot be construed as affording recourse against it.

The respondent must be regarded as having been the owner of the bonds which it sold to the petitioner. Selling property is an act of ownership, unless the contrary is shown. *Farmers and Merchants State Bank* v. *Mellum, et al.*, 173 Minn. 327, 212 N. W. 308. There is no such showing in the record of this case.

Being the owner of the bonds, the respondent sold them upon the condition which, in substance, provided that if the petitioner desired to do so, he could return them and receive back from the respondent the purchase price which it received and retained as part of its assets. In short, the sale was subject to defeasance upon a condition subsequent.

Wolf v. *National Bank of Illinois*, 178 Ill. 85.
Ubben v. *Binnian*, 182 Ill. 508.

Kantzeler v. *Bensinger*, 214 Ill. 589.
Stewart v. *Dobson*, 282 Ill. 192.
Freedman v. *Madison & Kedzie State Bank*, 258 Ill. App. 519 (*certiorari* denied, 259 Ill. App. XIV.)

Viewed thusly, it cannot be said that the agreement in question was a guaranty of the bonds or afforded recourse against the respondent. It merely permitted the petitioner to be placed in *statu quo* if he so desired. The respondent would again become the owner of the bonds which it formerly owned and the petitioner would have his money back. As long as the respondent had the authority to buy the bonds in the first instance, it must have the authority to buy them from the petitioner. Especially must this be true, when the respondent's agreement was an inducement to the petitioner to pay Thirty Five Thousand Dollars ($35,000) for the bonds.

The Appellate Court, in holding void the repurchase agreement in this case, relied upon the decision of the Illinois Supreme Court in *Knass* v. *Madison & Kedzie State Bank*, 354 Ill. 554. This decision apparently, but not in fact, overruled the last cases cited by us, but it is clearly distinguishable upon its facts from the case at bar.

In the *Knass* case, *supra*, 354 Ill. 554, when the Madison & Kedzie State Bank sold the bonds to the petitioner and agreed to repurchase them, it was acting as a broker for the maker of the bonds. As a broker, the bank did not retain the purchase price of the bonds, but turned it over to its principal, less a broker's commission. Under these facts, when the bank was called upon to repurchase the bonds, it could not be placed in *statu quo* as the respondent would have been if it had performed the obligations of

its agreement. In the *Knass* case, the bank, if it repurchased the bonds, would not be able to use the money it had received from the original sale and which had been turned over to the maker.

We respectfully submit that in this case the respondent was authorized in its charter to buy and sell the bonds in question without recourse; the contract of November 1, 1929, did not guarantee or afford recourse against the respondent, but it merely permitted the petitioner to return the bonds and obtain from the respondent the money which he had paid to it and which the respondent retained. We, therefore, respectfully submit that this contract was not *ultra vires*, but squarely within the granted powers of the respondent bank.

C.

Even if the repurchase agreement is construed as a guaranty, it is an incidental power of the respondent as a National Bank to make a contract of guaranty for its own benefit.

Although we believe that the repurchase agreement in this case cannot be construed as a guaranty, yet we may assume for the purpose of arguing this point, that the contract was a guaranty of the bonds which the respondent sold. However, even with this assumption, we believe that the agreement was not *ultra vires* or beyond the power of the respondent bank under the National Bank Act.

This Court has held that a National Bank may enter into a contract of guaranty for its own benefit.

People's Bank v. *Manufacturers' National Bank*, 101 U. S. 181.

To the same effect are the following Federal and State court decisions:

Farmers' & Miners' Bank, et al. v. *Bluefield National Bank, et al.*, 11 Fed (2d) 83, 85 (*certiorari* denied, 46 S. Ct. 483).

Farmers and Merchants State Bank v. *Mellum, et al.*, 173 Minn. 327, 212 N. W. 308.

Citizens' National Bank v. *Good Roads Gravel Co.*, 236 S. W. 153 (Tex.).

Clearly, if, as we have assumed for the purpose of arguing this point, the repurchase contract is deemed to be a guarantee of the bonds sold to the petitioner, it is for the benefit of the respondent bank.

We have already shown to the Court that upon the record in this case the respondent must be regarded as having been the owner of the bonds which it sold. Being the owner, the power and authority to guarantee the payment of the bonds must be regarded as incidental to the power to sell them. Such an incidental power is a benefit to the bank for the reason that it permits it to offer an inducement to a prospective purchaser. It is able to offer this inducement without creating any liability in excess of the asset or assets which it has received by reason of the making of the guaranty. When the bank has performed its contract, it merely exchanges bonds for money which it had received in the first instance from the sale of the bonds.

II.

The respondent, having received the benefits of the repurchase contract is estopped to plead its want of authority to enter into such an agreement.

Again if we assume for the purpose of this argument that the contract in question made the sale of the First National Company Bonds to the petitioner a sale with recourse, and constituted a guaranty of the bonds, the respondent could not avail itself of the defense of *ultra vires*.

The statute gives to the respondent the authority to buy and sell investment securities without recourse. To sell them with recourse would be only *an abuse of granted power* and the respondent, having received the benefits of a contract made only in excess or in abuse of its *granted powers*, is estopped to plead the defense of *ultra vires*.

Gibson v. *Kansas City Refining Co.*, 32 F. (2d) 658.

Standard Furniture Co. v. *Smith*, 32 F. (2d) 176.

Grand Valley, etc. v. *Zummbrunn*, 272 Fed. 943.

This rule must be distinguished from that principle, laid down by this Court, to the effect that a corporation cannot be estopped from pleading the defense of *ultra vires* to an act which it had *no* authority under its charter to do. In this case the respondent had the authority and power to sell the bonds so that at the most it *abused* that *granted* power by selling the bonds with recourse.

III.

Even if the repurchase agreement is ultra vires and void, the petitioner is entitled to recover from the respondent, in general assumpsit, the amount of money he paid to said respondent for the purchase of the bonds in question on the strenght of said agreement.

We have already pointed out to the Court that the respondent must be regarded as having been the owner of the bonds which it sold, so that when it received Thirty Five Thousand Dollars ($35,000) from the petitioner, the purchase price therefor, that money was retained by it and took the place of the bonds among the bank's assets. The respondent received the benefit from the contract.

The respondent repudiated its agreement when called upon to perform it, after having received the benefit therefrom, but it is a well-settled rule of law often decided by this Court, that a corporation, which has repudiated a contract as being *ultra vires*, will not be permitted to retain the benefits it has received under such a void agreement, and is liable therefor upon an implied assumpsit.

Central Transportation Co. v. *Pullman, etc. Co.*, 139 U. S. 24, 60.

Logan County National Bank v. *Townsend*, 139 U. S. 67.

Pullman Car Company v. *Central Transportation Co.*, 171 U. S. 138, 151.

Aldrich v. *Chemical National Bank*, 176 U. S. 618.

Citizens' Central National Bank v. *Appleton*, 216 U. S. 196.

This doctrine is distinguishable from the general rule announced by this Court that a corporation may not be estopped to plead the defense of *ultra vires* and that no rights arise out of an *ultra vires* contract; it is predicated upon the theory that the corporation, having received money or property under a void agreement, is not, in equity and good conscience, entitled to retain the money or property and at the same time repudiate the contract.

The case of *Citizens' Central National Bank* v. *Appleton, supra*, 216 U. S. 196, is one wherein a National Bank, to which one Samuels was indebted in the sum of Ten Thousand Dollars ($10,000), induced another bank to lend Twelve Thousand Dollars ($12,000) to Samuels and guaranteed the repayment of the loan. Samuels had prior thereto agreed to pay the National Bank Ten Thousand Dollars ($10,000) out of the Twelve Thousand Dollars ($12,000) loan. When sued on the guaranty, the National Bank defended on the ground that a guaranty was beyond its powers and in violation of the National Banking laws. Of this defense, the Court said, on page 202:

> "But this action need not be regarded as one on the written contract of guaranty, but as based on an implied contract between the Cooper Exchange Bank and the Central National Bank * * *. The law would be more impotent to do justice if it could not, under those circumstances, and without violating established legal principles, compel the Central National Bank to recognize and discharge that duty. * * * In short, the Central National Bank, by means of the device mentioned, got Ten Thousand Dollars ($10,000) * * * for its own benefit, and having used it for its own benefit, it now seeks to avoid liability therefor, upon the ground that it was not allowed by the law of its creation to execute the guaranty in question. We

know of no adjudged case that stands in the way of relief being granted as asked by the plaintiff. But there are many that will authorize such relief."

The Court then reviewed and discussed with approval the cases last cited by us in support of this point. For that reason, the *Appleton* case, *supra*, 216 U. S. 196, is important.

In this case, the petitioner was proceeding in special assumpsit on the written contract and in general assumpsit on an implied contract. The Appellate Court held, first, that there could be no recovery on the written contract because the respondent had no authority under the banking act to make such an agreement, and, second, that the contract being *ultra vires*, the petitioner could not recover anything in general assumpsit. The Appellate Court, therefore, reversed the judgment of the Circuit Court of Cook County and, without remanding the cause, entered its own judgment against the petitioner. Upon the authority of the cases last cited by us, the petitioner is entitled to recover, in general assumpsit, the money he paid to the respondent upon the strength of and reliance upon the contract which the respondent repudiated as being *ultra vires*. The Appellate Court, therefore, should have remanded the cause to the Circuit Court, to enable the petitioner to pursue this remedy. In failing to do this, the Appellate Court deprived the petitioner of a right to which this Honorable Court has held him entitled.

CONCLUSION.

We respectfully submit to this Honorable Court that we have shown that the agreement of November 1, 1929, by which the respondent agreed to repurchase the bonds in question, was and is not *ultra vires* the respondent for the reason that it was expressly authorized under the National Bank Act to buy and sell these bonds without recourse; that this contract did not afford recourse against the respondent, and that, even assuming that it did afford recourse, the respondent could, under the banking laws, make a contract of guaranty for its own benefit. We respectfully submit that we have shown that even if the agreement of November 1, 1929, were *ultra vires* and void, the petitioner is entitled to recover from the respondent, in general assumpsit, the moneys paid to the respondent in reliance upon the claimed *ultra vires* and void agreement.

We, therefore, respectfully submit that the Appellate Court of Illinois, First District, erred in reversing the judgment of the Circuit Court of Cook County and also in reversing said judgment without remanding said cause to the trial court.

Respectfully submitted,

SAMUEL A. ETTELSON,

EDWARD C. HIGGINS,

Attorneys for Leo Awotin, Petitioner.

APPENDIX.

Illinois Civil Practice Act, sub-section (2) of Section 75, Article VIII:

"In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals are specifically required by the Constitution of the State to be allowed from the Appellate Courts to the Supreme Court, the judgments or decrees of the Appellate Courts shall be final, subject, however, to the following exceptions: (1) In case a majority of the judges of the Appellate Court or of any branch thereof shall be of opinion that a case (regardless of the amount involved) decided by them involves a question of such importance, either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, they may in such case grant leave to appeal to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal. (2) In any such case as is hereinbefore made final in the said Appellate Courts it shall be competent for the Supreme Court to grant leave to appeal for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal to the said Supreme Court: *Provided, however,* that in actions *ex contractu* (exclusive of actions involving a penalty) and in all cases sounding in damages the judgment, exclusive of costs, shall be more than fifteen

hundred dollars ($1,500.00), or in cases in which the judgment is against the plaintiff and there is issued by the Appellate Court, or by one of the judges thereof in vacation, a certificate to the effect that there is fairly involved in the claim of the plaintiff more than fifteen hundred dollars ($1,500.00). *And provided also,* that application under this Act to the Supreme Court to cause it to grant leave to appeal for its review and determination shall be made on or before twenty (20) days before the first day of the succeeding term of said Supreme Court: *Provided,* fifty (50) days shall have intervened between the day on which a rehearing in the Appellate Court shall have been denied or the day on which the leave to apply for a rehearing shall have expired without any such application having been made, and the first day of such succeeding term of said court. But if less than fifty (50) days shall have intervened as aforesaid, then such application shall be made on or before twenty (20) days before the first day of the second term of the Supreme Court succeeding the day on which a rehearing in the Appellate Court shall have been denied or the day upon which the leave to apply for a rehearing shall have expired without any such application having been made, otherwise said power of the Supreme Court to review the judgment and decree of the Appellate Court shall cease to exist."

Illinois Practice Act of 1907, section 55 (Cahill's Illinois Revised Statutes, 1931, Chap. 110, Sec. 55):

"Affidavit of plaintiff's claim—Default—Defendant's affidavit of merits.) Sec. 55. If the plaintiff in any suit upon a contract, express or implied, for the payment of money, shall file with his declaration an affidavit showing the nature of his demand, and the

amount due him from the defendant, after allowing to the defendant all his just credits, deductions and set-offs, if any, he shall be entitled to judgment, as in case of default, unless the defendant, or his agent or attorney, shall file with his plea an affidavit, stating that he verily believes the defendant has a good defense to said suit upon the merits to the whole or a portion of the plaintiff's demand, and specifying the nature of such defense, and if a portion specifying the amount (according to the best of his judgment and belief), upon good cause shown, the time for filing such affidavit may be extended for such reasonable time as the court shall order; no affidavit of merits need be filed with a demurrer or motion: *Provided,* that this section shall not apply to any case where an executor or administrator shall defend in behalf of any estate: *And, provided, further,* that if the plaintiff, his agent or attorney, shall file an affidavit stating that affiant is taken by surprise by such plea and affidavit of merits, and that he believes that plaintiff has testimony to support his claim against the defendant which he cannot produce at that term of court but expects to produce by the next term, the court shall continue such cause until the next term. If the affidavit of defense is to only a portion of the plaintiff's demand, the plaintiff shall be entitled to a judgment for the balance of his demand, and the suit shall thereafter proceed as to the portion of the plaintiff's demand in dispute as if the suit had been brought therefor; but in such case the court may make such order as to the costs of the suit as may be equitable."